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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~166~~ 40

THE UNITED STATES, APPELLANTS,

vs.

ANTHONY W. HENRY.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 2, 1871.

Atkins.

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SUPREME COURT OF THE UNITED STATES.

No. 466.

THE UNITED STATES, APPELLANTS,

vs.

ANTHONY W. HENRY.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the U. S. Court of Claims.

ANTHONY W. HENRY
vs.
THE UNITED STATES. } No. 3069. Filed February 4, 1868.

To the honorable the judges of the Court of Claims:

The petition of Anthony W. Henry, of Madison, in the county of Jefferson, and State of Indiana, respectfully represents:

That, on the tenth day of August, 1863, a commission was executed in due form of law, by his excellency David Tod, then governor of the State of Ohio, nominating and appointing your petitioner a second lieutenant in the Second Regiment of Ohio Volunteers, (infantry,) and that said commission was received and accepted by petitioner on the 15th day of August, 1863.

That, by reason and by virtue of the said commission, so issued and accepted, your petitioner reported for duty to the commanding officer of said regiment, on the day and year last aforesaid, and was by him assigned to duty as second lieutenant, in Company D, of said regiment.

That your petitioner actually served and performed the duties of second lieutenant, from the said 15th day of August, 1863, until the 10th day of October, 1864, when he was mustered out of the military service of the United States, with said regiment, and received a certificate of honorable discharge as 1st sergeant of said Company D.

2 That, during all the time aforesaid, he was known and recognized as a commissioned officer, of the rank aforesaid, by his superior officers, as well as by the rank and file of his command; and a portion of the time, and during several battles, your petitioner commanded said company.

That, upon receipt of said commission from the governor of Ohio, your petitioner presented himself for muster as second lieutenant, to the proper mustering officer of his division, but was refused such muster, the said mustering officer alleging that the said Company D, to which petitioner was assigned, was reduced below the minimum number, and that, therefore, petitioner was not entitled to be mustered.

That your petitioner repeatedly offered himself for muster to the proper officer during the time aforesaid, but without success. That he was always ready and anxious to be so mustered, and that his failure to be so mustered arose from a cause beyond his control, and without fault or neglect of his own.

That, on the 10th day of October, 1864 when said regiment was mustered out of service, your petitioner was paid the amount due to the rank and services of 1st sergeant of infantry, and no more.

That he has applied to the Pay Department of the United States Army for the pay and allowances of a second lieutenant during said term of service, after deducting the pay so received as 1st sergeant. But payment of the same or any part thereof was refused by said department.

That your petitioner has always borne true allegiance to the Government of the United States; is a citizen of the United States, and has never aided, abetted, or given encouragement to the recent rebellion against said Government.

By reason of the premises and of the joint resolution of Congress, approved July 26th, 1866, your petitioner claims that he is entitled to receive from the United States the pay and allowances of a second

lieutenant of infantry, from the 15th day of August, 1863, to the tenth day of October, 1864, after deducting the pay of 1st sergeant received as aforesaid.

3 That the pay and allowances so due, as second lieutenant, amount in the aggregate to fourteen hundred and sixteen dollars and eleven cents; and the pay so received as 1st sergeant was two hundred and ninety-eight dollars; leaving a balance in favor of your petitioner of eleven hundred and eighteen dollars and eleven cents. And for which sum he respectfully prays for payment.

CHIPMAN & HASMER,
W. S. TAYLOR,
Claimant's Attorneys.

STATE OF INDIANA, *County of Jefferson, ss:*

Anthony W. Henry, being duly sworn, says: That he is the petitioner named in the above and foregoing petition, and that no assignment or transfer of the claim therein set forth, or any part thereof, or any interest therein, has ever been made to any person whomsoever; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that he verily believes the facts as stated in said petition are true.

ANTHONY W. HENRY.

Sworn and subscribed before me this 6th day of January, 1868.
Witness my hand, and seal of circuit court of said county, at Madison.

DAVID G. PHILLIPS, *Clerk.*

United States Court of Claims. December term, A. D. 1867.

ANTHONY W. HENRY
vs.
THE UNITED STATES. } No. 3069. Filed 12 May, 1868.

4 *Demurrer to petition.*

And said defendant, by John J. Weed, its solicitor, comes and says that the claimant's petition, and the matters and things therein stated and set forth, are not sufficient in law for the said claimant to have or maintain his aforesaid action thereon against the said defendant. Wherefore the said defendant prays judgment, &c.

JOHN J. WEED,
Assistant Solicitor for the United States.

5 In the Court of Claims.

ANTHONY W. HENRY
vs.
THE UNITED STATES. } 3069.

At a Court of Claims held at the Capitol in the city of Washington, twenty-sixth of May, A. D. 1871, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Anthony W. Henry have and recover of and from the United States the sum

of one thousand one hundred and eighteen dollars and eleven cents, ($1,118.11.)

By the court.

6 In the Court of Claims. December term, 1870.

ANTHONY W. HENRY
vs. } 3069.
THE UNITED STATES.

From the judgment rendered in the above-entitled cause, on May 26th, 1871, in favor of the claimant, the defendants, by their Attorney General, on this 22nd day of August, 1871, make application for an allowance of an appeal to the Supreme Court of the United States, the judgment in this case being one which will affect a class of cases.

THOMAS H. TALBOT,
Ass't Att'y General.

Filed in the clerk's office Aug'st 22, 1871.

AT CHAMBERS.

The judgment in the above-entitled cause being one which will affect a class of cases, the appeal prayed for is allowed.

C. D. DRAKE, *C. J.*

7 Court of Claims.

ANTHONY W. HENRY
vs.
THE UNITED STATES.

Findings of fact & conclusions of law.

This case having been heard before the chief justice and judges of the Court of Claims, at the city of Washington, on the 16th day of May, 1871, the court, after due deliberation upon the proofs and evidence given at the trial, does hereby, at the time of rendering judgment, find the following facts:

On the tenth day of August, 1863, a commission was executed in due form of law by his excellency, David Todd, then governor of the State of Ohio, nominating and appointing the claimant a second lieutenant in the Second Regiment of Ohio Volunteers, (infantry,) and was received and accepted by the claimant on the 15th day of August, 1863, he
8 then being the 1st sergeant of Company "D," in such regiment.

By reason of the commission so issued and accepted, the claimant reported for duty to the commanding officer of said regiment on the day and year last aforesaid, and was by him assigned to duty as second lieutenant in Company D of said regiment.

The claimant actually served and performed the duties of second lieutenant from the said 15th day of August, 1863, until the 10th day of October, 1864, when he was mustered out of the military service of the United States, with said regiment, and received a certificate of honorable discharge, as 1st sergeant of said Company D.

During all of the time aforesaid he was known and recognized as a commissioned officer of the rank aforesaid, by his superior officers, as

well as by the rank and file of his command; and a portion of the time, and during several battles, commanded the company.

9 Upon receipt of the commission from the governor of Ohio the claimant presented himself for muster, as second lieutenant, to the proper mustering officer of his division, but was refused such muster, the mustering officer alleging that Company D, to which the claimant was assigned, was reduced below the minimum number, and that, therefore, he was not entitled to be mustered. The claimant repeatedly offered himself for muster to the proper officer during the time aforesaid, but without success. He was always ready and anxious to be so mustered, and his failure to be so mustered arose from a cause beyond his control, and without fault or neglect of his own.

On the 10th day of October, 1864, when his regiment was mustered out of service, he was paid the amount due to the rank and services of 1st sergeant of infantry and no more.

10 He has applied to the Pay Department of the United States Army for the pay and allowances of a second lieutenant during said term of service, after deducting the pay so received as 1st sergeant. But payment of the same, or any part thereof, was refused by said department.

The claimant has always borne true allegiance to the Government of the United States, is a citizen of the United States, and has never aided, abetted, or given encouragement to the recent rebellion against said Government.

The pay and allowances so due, as second lieutenant, amount in the aggregate to fourteen hundred and sixteen dollars and eleven cents. And the pay so received, as 1st sergeant, was two hundred and ninety-eight dollars, leaving a ballance of eleven hundred and eighteen dollars and eleven cents due and unpaid to the claimant.

11 And the court, at the request of the defendants, further finds:

In the Court of Claims of the United States. December term, 1870.

ANTHONY W. HENRY
vs.
THE UNITED STATES.

1. The placing on duty alleged in this case was merely by the order of the colonel of the regiment.

2. From August, 1863, to October, 1864, no company of said regiment had a minimum number of men.

The United States, by their Attorney General, on the day of the trial of said cause, request the court to find the above facts.

THOMAS H. TALBOT,
Assistant Attorney General.

12 And upon the foregoing findings of fact the Court of Claims, as a conclusion of law for the purposes of an appeal to the Supreme Court, decides:

That the claimant having, under a proper military commission from the Governor of Ohio, discharged the duties and suffered the risks and responsibilities of a commissioned officer in actual military service, pursuant to the orders of his regimental commander, and in the absence of other commissioned officers to command the company to which he was assigned, should recover his pay for the services actually rendered, not-

withstanding that the company to which he was attached was below the minimum number required by the War Department.

By the court.

13 In the Court of Claims.

ANTHONY W. HENRY
vs.
THE UNITED STATES. } No. 3069.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney General for defendants, for the allowance of an appeal, as filed in the clerk's office 22d August, 1871, and of the order of the chief justice of said court, allowing the same; of the finding of facts, and the conclusion of law thereon, on which the court founded its judgment.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this second day of December, A. D. 1871.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 466. The United States, appellants, vs. Anthony W. Henry. Court of Claims. Filed 2nd December, 1871.

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Due To

CONDITION OF ORIGINAL

In the Supreme Court of the United States.

DECEMBER TERM, 1872.

THE UNITED STATES, *Appellants*,
vs.
ANTHONY W. HENRY. } No. 227.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

DECEMBER TERM, 1872.

THE UNITED STATES, *Appellants*,
vs.
ANTHONY W. HENRY. } No. 227.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a petition to the Court of Claims by an officer for pay as acting lieutenant of the army, under the joint resolution of July 26, 1866, (14 Stats. at Large, 368,) which enacts—

"That in every case in which a commissioned officer actually entered on duty as such commissioned officer, but by reason of being killed in battle, capture by the enemy, or other cause beyond his control, and without fault or neglect of his own, was not mustered within a period of not less than thirty days, the pay department shall allow to such officer full pay and emoluments of his rank from the date on which such officer actually entered on such duty as aforesaid, deducting from the amount paid, in accordance with resolution, all pay actually received by such officer for such period."

The claimant, who was first sergeant of company D, in the second regiment of Ohio volunteers, was appointed and commissioned, on the 10th of August, 1863,

by the Governor of Ohio, as second lieutenant in that regiment.

He reported for duty to the commanding officer of said regiment, and was by him assigned to duty as second lieutenant in that company.

He actually served and performed the duties of second lieutenant from the 15th of August, 1863, to the 10th of October, 1864, when he was mustered out of the military service of the United States, with said regiment, and received a certificate of honorable discharge as first sergeant of said company.

On receipt of the commission from the Governor of Ohio the claimant presented himself for muster as second lieutenant to the proper mustering officer of his regiment, but was refused such muster, the mustering officer alleging that company D, to which the claimant was assigned, was reduced below the mimimum number, and that, therefore, the claimant was not entitled to be mustered.

On the 10th of October, 1864, when his regiment was mustered out of the service, he was paid the amount due to the rank and services of first sergeant of infantry, and no more.

The Court of Claims also find that—

"1. The placing on duty alleged in this case was merely by the order of the colonel of the regiment.

2. From August, 1863, to October, 1864, no company of said regiment had a minimum number of men."

Upon the above facts the Court of Claims, "as a conclusion of law, for the purposes of an appeal to the Supreme Court, decides"—

"That the claimant having, under a proper military commission from the Governor of Ohio, discharged the duties and suffered the risks and responsibilities of a commissioned officer in actual military service, pursuant to the orders of his regimental commander, and in the absence of other commissioned officers to command the company to which he was assigned, should recover his pay for the services actually rendered, notwithstanding that the company to which he was attached was below the minimum number required by the War Department."

ASSIGNMENT OF ERROR.

Upon the above facts, so found by the Court of Claims, the claimant was not entitled to the benefit of the joint resolution of 1866.

ARGUMENT.

By the act of March 3, 1863, section 20, (12 Stats. at Large, 734, 735,) it is enacted—

"That whenever a regiment is reduced below the minimum number allowed by law, no officers shall be appointed in such regiment beyond those necessary for the command of such reduced number."

And the claimant in his petition bases his claim, and argued his case in the court below, solely upon the joint resolution of July, 1866; and the question is, whether that resolution applies to officers who were actually commissioned and entered upon duty according to their commissions, but could not be mustered in during the time for which they served without a violation of the law.

It is submitted that this is not the proper construction of the statute.

The language of the first part of the resolution is, "that in every case in which a commissioned officer actually entered on duty as such commissioned officer, but by reason of being killed in battle, capture by the enemy, *or other cause* beyond his control," was not mustered in, &c. Applying the ordinary rule of interpretation, that general words are to be construed as *ejusdem generis*, it would seem to be clear that the other causes referred to in the resolution are causes similar in nature to those particularly mentioned, namely, by reason of being killed in battle, or capture by the enemy.

The joint resolution of July 11, 1870, section 3, (16 Stats. at Large, 385, 386,) enacts, that the resolution

of July 26, 1866, "shall not be construed to apply to cases in which, under the laws and army regulations existing at the time, there could have been no lawful muster into service even after the actual receipt of the commission."

This resolution, which would seem to have been enacted for the purpose of removing any doubt upon the subject, is a legislative construction of the act, which ought to be followed, and seems to have been the construction uniformly placed upon the first resolution by the War Department.

See United States *vs.* Alexander, 12 Wallace, 177, 180, 181.

C. H. HILL,
Assistant Attorney General.

Supreme Court of the United States.

THE UNITED STATES, Appellants,

vs.

ANTHONY W. HENRY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

Henry was a sergeant in Co. D, 2d regiment Ohio infantry volunteers. On 15th August, 1863, while sergeant, he received a commission from the Governor of Ohio, appointing him second lieutenant in said company. He served and performed duty as second lieutenant from August 15, 1863, to October 10, 1864; when he was mustered out of the military service, and received an honorably discharge as sergeant of said company.

Upon receipt of his commission from the said Governor, he presented himself for muster to the proper mustering officer, but was refused muster for the reason that said company was reduced below the minimum number, and was therefore not entitled to be mustered, as was claimed by the mustering officer.

Henry repeatedly offered himself for muster, but without success; his failure having arisen from a cause beyond his control, and no fault or neglect of his own.

While performing the duties of lieutenant as aforesaid,

he was recognized as a commissioned officer of the rank of lieutenant by his superior officers, as well as by the rank and file, and during several battles commanded his company as commanding officer.

Upon his muster-out, he was paid for his services as sergeant, and not as lieutenant. Having failed to secure payment for his services as lieutenant before the proper department, he brought suit in the Court of Claims, and recovered judgment for the difference between the pay of lieutenant and sergeant, to wit, $\$1{,}118\frac{11}{100}$. (pp. 3, 4, Rec.)

ARGUMENT.

This suit is based upon the first section of the following joint resolution of Congress, approved July 26, 1866, entitled "Joint resolution for the relief of certain officers of the army":

"*Be it resolved, &c.*, That in every case in which a commissioned officer actually entered on duty as such commissioned officer, but, by reason of being killed in battle, captured by the enemy, or other cause beyond his control, and without fault or neglect of his own, was not mustered within a period of not less than thirty days, the pay department shall allow to such officer full pay and emoluments of his rank from the date on which such officer actually entered on such duty as aforesaid, deducting from the amount paid in accordance with this resolution all pay actually received by such officer for such period." (14 Stats. at Large, p. 368.)

This act of Congress was passed to provide for the payment of commissioned officers who had entered upon duty prior to muster, but who, under existing orders of the War Department, could not be paid for such service.

We urge—

FIRST. The law is clear, and admits but one construction. In such a case the court has no other duty but to enforce it. Where a statute is plain and unambiguous, nothing is left to construction. (United States *v.* Fisher, Assignee of Blight, 2 Cranch, 358.) This canon of the law will not

be questioned. What is the fair, obvious meaning of the joint resolution? We think it intended to cover all cases where the following conditions are met: 1, that the officer was duly commissioned; 2, that he entered upon duty as such; 3, that he was not mustered "within a period of not less than thirty days," "by reason of being killed in battle, captured by the enemy, or other cause beyond his control, and without fault or neglect of his own." In such case the law distinctly says: "The pay department shall allow such officer the full pay and emoluments of his rank from the date on which such officer actually entered on such duty as aforesaid."

The case at bar meets the requirements of the law in all respects.

Henry was not "killed in battle;" he was not "captured by the enemy," but he was, "*without fault or neglect of his own*," and by "*cause beyond his control*," to wit, by refusal of the proper mustering officer to muster him, prevented from being mustered, and was thus deprived of pay.

The inquiry would seem to narrow itself to the one question: Did Congress intend to embrace cases like Henry's in the general provisions above quoted?

Henry was denied muster. The cause assigned for the denial was that the company was reduced below the minimum, *i. e.*, had not over sixty-four privates in it. The *cause*, however, is not, we think, important, so that it was "*beyond the control*" of Henry, and that the findings settle in clear terms; and further, that the non-muster was "*without fault or neglect of his own*," and this also the findings settle in clear terms.

If the findings nowhere disclosed the reason for the refusal to muster, there can be no doubt that Henry should recover, for they are in the words of the statute, and cover every requirement laid down therein.

The law is conceived in the most liberal spirit, and should be so construed. It is remedial, and should for that reason be liberally construed.

SECOND. The act was passed by Congress after the war

had ended, and, being remedial, was made retroactive, with a view of enabling officers to collect pay for service where it had been denied them under the regulations of the War Department during service, and was intended for no other purpose than to meet the prohibitions of those regulations. In any other view the law was unnecessary.

Where the officer was entitled to muster under the regulations and orders of the department, the officer was mustered at the time, and received his pay, or he was mustered by the department upon application, and the muster was antedated so as to give the officer his pay; but in no case was this done where the muster would conflict with existing orders. Hence the interposition of Congress to provide for the payment of a class of claimants whose cases could not be adjusted by the department without a violation of its own regulations and orders. Congress seems only to have required that the officer did duty under commission, and was not mustered, through no fault of his own, and the act relieved the officer against the existing regulations of the department. It was these cases which gave rise to the law.

THIRD. In remedial statutes the inquiry is as to the old law, the mischief, and the remedy.

The answer is here: *First*, the old law, *i.e.*, the regulations, forbade muster and payment where the company had been reduced below the minimum; *Second*, the mischief was that the old law worked great injustice, by depriving officers of pay for actual service; *Third*, and the remedy was the law in question.

But if this suit cannot be maintained, then the old law must govern, while the mischief and the remedy are wholly ignored; the object Congress had in view is defeated, and the law Congress passed to attain it is set at naught.

FOURTH. The fact that the company had become reduced below the minimum when Henry received his commission is not a good reason for refusing pay now.

Undoubtedly this fact at the time was the best possible

reason for the mustering officer to refuse muster. He was bound to obey orders.

For like reason the paymaster at the time could not pay Henry, for orders and regulations of the Department very properly prohibited payment before muster.

And if these orders and regulations still apply to Henry's case, and the act of Congress has not suspended them as to him and others like him, then there is no remedy; but it is claimed that Congress interposed to relieve the officer in precisely this case and all like it.

Admitting for the argument that there was no authority for the muster at the time he was commissioned, and that therefore Henry was not entitled to be paid as an officer, was it not competent for Congress afterwards to recognize his service and pay him for it? This claim upon Congress stood on higher grounds than even the bounties so freely bestowed, and one cannot be set aside sooner than the other by departmental construction.

The question is not what Henry's rights were in 1863, but what they are now.

Give the statute a moment's analysis.

First illustration: If a commissioned officer entered upon duty and was not mustered within a period of thirty days, without fault or neglect of his own, and subsequently was "*killed in battle*," his heirs are entitled to pay for his services as such officer.

Second illustration: The same, if after commission he was "*captured by the enemy.*"

Is there any condition attached in either of these instances that the company must have been above the minimum when the officer received his commission? Suppose Henry, after he had failed to obtain muster, and in one of the battles where he commanded his company had been "captured by the enemy," or had been "killed," what would have been the result—how would he have stood? I think precisely as now. And yet would there be doubt of his right to pay under the law?

Under departmental administration all such officers re-

ceive no pay for services if the company was below the minimum at the time the commission issued, but clearly the law in its liberal spirit was made to give to officers immured in rebel prisons the pay of officers; it was made to give to the heirs of officers killed in battle the pay allowed by law to other officers. Why not also to him who from "*other* causes beyond his control" was not mustered.

It is a well-settled canon of the law that a statute must be given some practical effect when it is possible. What practical effect would flow from extending it exclusively to cases where the company had more than the minimum number of enlisted men when the officer received his commission? None whatever, for all such cases are already provided for, and were when the law passed.

Again: How can this court know what classes of cases Congress had in mind when the language "other cause beyond his control" was used?

If the court may impose a condition that the company must have been above the minimum at the time, where is the limit to conditions that may be added to the statute?

In point of fact such a condition would not only be unjust to the officer, but dangerous to the service.

Regiments and companies in active service in time of war cannot be kept above the minimum, and while companies are depleted, officers suffer also. The needs of the service require officers as long as soldiers have duty to perform. Often companies are left without commanding officers, and in the case at bar Henry, though a second lieutenant, commanded the company in several engagements. However wise the rule, and from whatever cause, that prohibited muster in such cases, Congress afterwards saw the justice of relieving the officers, and this relief ought not now to be taken from them. *Quantum meruit* may have governed Congress, but whatever the governing motive is no concern of the court: it is the intention alone which may be inquired into.

FIFTH. If the plain meaning of the law is not to be followed, and it is permissible to search outside for its inter-

pretation, the history of the act is conclusively in defendant's favor. We cite the proceedings in Congress. (1st Sess. 39th Cong. Globe, vol. 57, p. 1604:)

"Mr. Bingham, from Committee on Military Affairs, reported joint resolution for the relief of certain officers of the army, which was read a first and second time.

"The joint resolution provides that in all cases in which a commissioned officer actually entered on duty as such commissioned officer, *and was entitled by law to be mustered in as such*, but by reason of capture by the enemy, or other cause beyond his control, and without fault or neglect of his own, *was not mustered according to the regulations*, within a period of not less than thirty days, the pay department shall allow such officer full pay and emoluments from the date on which such officer actually entered on such duty as aforesaid, deducting the pay actually received by such officer for such period."

[Which was doubtless pay as enlisted man.—N. P. C.]

"Mr. Hale. I beg to inquire of the gentleman from Ohio whether this will cover the case of officers who served in their promoted rank, and died before being mustered in.

"Mr. Bingham. It does, within the words 'or other cause,' if such cases are not already provided for.

"Mr. Shellabarger. I move to insert the words, 'killed in battle.'

"Mr. Bingham. I have no objection.

"The amendment was agreed to, and the joint resolution as amended passed."

The joint resolution, as it originally passed the House, is as follows:

"39TH CONGRESS, 1ST SESSION. (H. R. 101.)

"In the Senate of the United States, March 27, 1866. Read twice and referred to the Committee on Military Affairs and the Militia.

"JOINT RESOLUTION for the relief of certain officers of the army.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That in every case in which a commissioned officer actually entered on duty as such commissioned officer, *and was entitled by law to be mustered in as such*, but by reason of being killed in battle, capture by the enemy, or other cause beyond his control, and without fault or neglect of his own, *was not mustered according to the regulations* within a period of not less

than thirty days, the pay department shall allow to such officer full pay and emoluments from the date on which such officer actually entered on such duty as aforesaid, deducting from the amount paid in accordance with this resolution all pay actually received by such officer for such period.

"Passed the House of Representatives March 23, 1866.

"Attest: EDWARD MCPHERSON, *Clerk.*"

The resolution then went to the Senate, and came up for discussion April 24, 1866. (See vol. 58, p. 2132, Cong. Globe, 1st Sess., 39th Cong.)

"Mr. Ramsey. I propose to amend the resolution by striking out in the fourth and fifth lines the words 'and was entitled by law to be mustered in as such.' And by striking out in the eighth line the words 'according to the regulations;' and then after the word 'days' in the ninth line, by inserting 'from acceptance of any appointment or actual entry on duty, and who was afterward regularly mustered into the service of the United States.'

"This amendment has been brought to the attention of the Committee on Military Affairs, and I believe I may say that the chairman is satisfied with it, and thinks it meets a case which ought to be provided for; the resolution, if amended as I propose, would read thus:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That in every case in which a commissioned officer actually entered on duty as such commissioned officer, [and was entitled by law to be mustered in as such,] but by reason of being killed in battle, capture by the enemy, or other cause beyond his control, and without fault or neglect of his own, was not mustered [according to the regulations] within a period of not less than thirty days *from acceptance of appointment or actual entry upon duty, and who was afterwards regularly mustered into the service of the United States*, the pay department shall allow to such officer full pay and emoluments from the date on which such officer actually entered on such duty as aforesaid, deducting from the amount paid in accordance with this resolution all pay actually received by such officer for such period.

"Passed the House of Representatives March 23, 1866.

"Attest: EDWARD MCPHERSON, *Clerk.*

"The amendment was agreed to.

"Mr. Sherman. I desire to suggest that there is one difficulty in the resolution as it now stands. It speaks of an officer who had not been mustered in by reason of having been killed in battle, and then it goes on to provide that afterward, if regularly mustered into the service of the United States, he shall have his pay. Certainly the condition would not arise after he has been killed; he cannot then be mustered into our army. The purpose may be good enough, but the language is liable to this criticism."

[This clause in italics was omitted finally in the act.—N. P. C.]

"Mr. Wilson. I prefer that the resolution be passed over, in order that we may look at the exact bearing of the amendment which has been adopted. I did not see all the amendment before it was offered.

"Mr. Grimes. I suggest it be printed.

"Mr. Wilson moved the postponement of further consideration. Adopted."

On May 7, 1866, in vol. 58, p. 2415, Cong. Globe, we find the following:

"Mr. Nesmith called up House joint resolution No. 101. Resolution as amended April 24, 1866, read.

"Mr. Wilson moved postponement until next day. Agreed to."

On July 9, 1866, (vol. 59, p. 3664, Cong. Globe, 1st Sess., 39th Cong.,) the following proceedings took place in the Senate:

"Mr. Ramsey called up House resolution 101, as amended April 24, 1866, and moved to amend in accordance with the understanding of the chairman. First, insert in tenth line, after word 'who,' the words 'if not killed in battle.'"

[This was to obviate Mr. Sherman's objection.—N. P. C.]

"Second. Amend line thirteen, by inserting after word 'emoluments,' the words 'of his rank.' Both agreed to."

[As amended it was the same as before, except in particulars easily seen, but not changing our view of the resolution.—N. P. C.]

"Third. Amend by inserting after word 'office,' the words 'or to his legal representative.'

"Mr. Wilson moved to strike out Mr. Ramsey's second

amendment, and insert a new section, for the reason that the Second Auditor, and not the pay department, pays the claims of representatives of deceased officers."

[This second section then reported was that finally adopted as the second section of the joint resolution.—N. P. C.]

This was all that transpired at that time. The resolution went to the House in that shape, and on the 18th of July, 1866, (vol. 60, p. 3909, Cong. Globe,) we find the following, under the title "Relief for army officers."

"Joint resolution came up on Senate amendments to joint resolution House Representatives, 101. Amendments were read as follows: In line three strike out the words, 'and was entitled by law to be mustered in as such.' In lines six and seven, strike out the words 'according to the regulations.' Insert after the word 'days,' in line seven, the following words: 'from acceptance of appointment or actual entry upon duty, and who, if not killed in battle, was afterward regularly mustered into service of the United States.' After the word 'emoluments,' in line ninth, insert the words 'of his rank.' At the end of the resolution add a new section, as follows:"

[Here follows the one as given in the Statutes at Large as the second section of the act.—N. P. C.]

"Mr. Schenck. I move that the House non-concur in the amendments of the Senate, and ask the appointment of a committee of conference. Agreed to."

The next proceeding in the case is the following: (Vol. 60, Cong. Globe, p. 3922, Senate:)

"Message from the House announcing its non-concurrence in Senate amendments, (H. R. 101,) and ask conference committee."

Same day (July 19, 1866,) Mr. Ramsey moved that the Senate insist on its amendments, and agree to conference. Agreed to.

(July 24, 1866, Cong. Globe, vol. 60, p. 4078,) Mr. Ramsey, Edgar Cowan, and William Sprague, who were appointed managers on the part of the Senate, submit report of conference committee, signed also by Messrs. Bingham, Marston, and Taylor, managers for the House.

"The committee of conference on the disagreeing votes of the two Houses on the amendments to the House resolution No. 101, for the relief of certain officers of the army, having met, after full and free conference have agreed to recommend, and do recommend, to their respective houses as follows: That the House of Representatives recede from their disagreement to the amendments of the Senate numbered 1, 2, 4, and 5, and agree to the same; that the Senate recede from its third amendment. Concurred in."

In the House of Representatives the same day, (July 24, 1866, Cong. Globe, vol. 60, p. 4110:)

"Mr. Bingham. I rise to a question of privilege. Asks that the report of the committee of conference on H. R. 101 be read. It is read. (Same as in Senate.)

"Mr. Bingham. I will explain to the House that the bill as amended by the conference committee provides for an agreement to some of the Senate amendments, and a disagreement as to others. The effect of the report will be to leave the bill so as to provide that in every case in which a commissioned officer has actually entered on duty, but by reason of being killed or captured by the enemy, *or other cause beyond his control*, was not mustered into the service, the pay department shall allow such officer, or his heirs, the full pay and emoluments of his rank from the day when he actually entered upon such duty, deducting all pay that may have been actually received by such officer. It provides that in case of death, the heirs or legal representatives of the party who would have been entitled to the compensation if he had lived shall receive it. I now call the previous question. It was ordered, and under its operation the committee report was agreed to."

It will be perceived, upon examination of the original House resolution, that there were two clauses stricken out by the Senate, and finally in the conference committee, which, if they had been retained, would have given authority to the department to refuse payment in these cases, for Congress would then have enacted the very exception interpolated into the law by the department. The first clause, in the fourth and fifth lines of the original joint resolution, is as follows:

"And was entitled by law to be mustered in as such."

And the second one, in the eighth line:

"Was not mustered according to the regulations."

As we read the resolution and the debate, the only object perceivable for striking out these clauses was to remove the barrier against the payment of an officer for services actually performed. It was well known to Congress and the department, that many officers were commissioned and ordered to perform the duty of commissioned officers; were clothed with the powers of commissioned officers; had imposed upon them the responsibilities of such officers; were subject to and were actually tried by court-martial as officers, and in short, were in every respect treated by the Government as officers, with the single exception as to pay. And the joint resolution was manifestly for no other purpose than to provide means by which officers could be paid for valuable services rendered. We have already remarked, and it would seem to be conclusive of the question, that this joint resolution could be intended for no other class than such as that to which this claimant belonged; for all others were provided for, and were paid, and no new legislation was necessary. The Senate perceived that the department would, under cover of the clauses to which we have invited attention, refuse to muster or pay officers intended to be brought within the provisions of the House resolution, and hence struck out the objectionable clauses. But the department has construed the resolution as though the clauses were still in the law. It is no matter under what circumstances the officer claims pay, the department refuses it unless he was entitled to be mustered under the regulations existing at the time he was commissioned. And in doing this, the heirs of the officer killed in battle or captured by the enemy, or who was not mustered from other cause beyond his control—in short, all coming within the described classes mentioned in the joint resolution are excluded from its benefits. As enforced in the department to-day, the statute is practically a dead letter, for no officer, and the heir of no

officer, can be paid for his services by virtue of any thing contained in the joint resolution under consideration. Now, it means something or nothing. We must presume that it was intended to furnish some remedy where there was none existing at the time; and there is no office for it to perform other than that which we claim.

As further evidence that we are construing the law as Congress intended it should be construed, we add an extract from proceedings of the House of Representatives, February 2, 1871, upon this subject. (Cong. Globe.)

The principle involved in the discussion is the principle in our case:

"February 2d, Mr. Holman, of Indiana, reported from Committee on Claims a bill for the relief of Captain David L. Wright, and the debate on the case, given below, shows the feeling of several Representatives on the subject. The bill directs the Paymaster General of the United States Army to pay out of any money appropriated or hereafter to be appropriated for the army, to David L. Wright, late captain company E, fifty-first regiment Indiana volunteers, the pay and emoluments of captain of infantry from June 30, 1863, the date of his commission, to March 14, 1865, the date of his discharge as a returned prisoner of war, as if he had been mustered as captain at the date of his commission.

"Mr. Dawes. I object.

"Mr. Benjamin and Mr. Hoar. I call for the regular order of business.

"Mr. Dawes. I understand that this is a report from a committee; I supposed it was from an individual member, and I withdraw my objection.

"Mr. Holman. I trust there will be no further objection.

"Mr. Poland. I desire to ask the gentleman from Indiana a question. Is not this case expressly provided for by general law?

"Mr. Holman. I will state, Mr. Speaker, that it is provided for by general law, but the construction of that general law renders it inoperative. Such, I have no doubt, is the experience of every gentleman here who has tried to get relief under it.

"Mr. Poland. During some of the last days of the last

session Congress passed an act expressly applying to every case of this character.

"Mr. Poland. I am aware that the War Department treated that act as a nullity, therefore I shall object to having an individual case passed here. Upon a resolution that I introduced, the War Department have sent down their construction of that law. That is now before the Military Committee, and we are soon to have a report from them on that subject. I shall object to any individual case being taken up and acted upon which involves the question that is covered by that general statute.

"Mr. Holman. I hope you will not apply it to this case.

"Mr. Poland. I shall apply it to every case. We have passed a general law covering this case; and if the War Department will not carry it out, I want the aid of my friend from Indiana, (Mr. Holman,) and the aid of every single man who has a case of that character, to compel obedience to the laws we pass upon that as well as other subjects. I therefore shall object to any individual case being taken up and passed.

"Mr. Holman. I trust my friend from Vermont will not defeat a just claim in consequence of the wrongful act of the War Department."

We have thus given our interpretation of the law and the reasons for it. What view the Attorney General may take we know not, as his brief is not yet filed; but certain we are that the law in question cannot be interpreted as the Department has construed it without defeating its intention; and this the court never will do if it can be avoided. Respectfully submitted,

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Attorneys for Defendant.

Supreme Court of the United States.

DECEMBER TERM, 1872.

THE UNITED STATES
v. No. 227.
ANTHONY W. HENRY.

SUPPLEMENTAL BRIEF FOR APPELLEE.

The brief of the Attorney General makes a word in reply necessary.

1. It is suggested that the claim of Henry rests upon an erroneous construction of the act of 1866, for the reason that general words, such as "*other cause beyond his control*," &c., are to be construed as *ejusdem generis*.

The simple reading of the statute must refute this position. The general words are the body of the law: the particular cases mentioned were inserted, as the history of the statute shows, out of abundant caution, and to secure to the classes of officers named the benefit of the act.

But we have fully stated our construction of the act, and need not again explain it.

2. The Attorney General interposes the third section of act of July 11, 1870, 16 Stats., 385, 386, as controlling the case. We reply:

a The third section applies only to cases arising under that act, and does not affect those under joint resolution of 1866.

The act of July 11, 1870, was passed to create additional classes to those entitled to the benefits of the act of 1866;

and while the former act, by the third section, limits the benefits to officers who were entitled to be mustered, the latter act makes no distinction.

b We insist, now that the question is raised, that there was nothing in the "laws or regulations" to prohibit the muster of Henry or any other officer, whose *company* had fallen below the minimum.

The Attorney General cites the 19th and 20th sections of the act of March 3, 1863, 12 Stats., 734, 735, to show that the law forbade muster when the company had fallen below the minimum.

Now, if we turn the 19th and 20th section of the law referred to, it will be seen that the act relates to the reduction of the *regiment* below the minimum, and provides for the consolidation of the companies of such regiments and the muster out of supernumerary officers; and that the act nowhere refers to *companies* being reduced below the minimum, and the prohibition of appointment of officers to such companies.

We find, therefore, upon this examination, that the War Department has wholly misinterpreted the law; and in now withholding, from officers commissioned after the reduction of the company below the minimum, pay as such officers, the Department does it by superadding to the law. Any one at all familiar with military service must know that, so long as the company retains its organization as a company, it must be officered; and this is true even though it be but a skeleton. Many reasons might be applied for the consolidation of regiments reduced below the minimum, which would not apply to companies; and Congress provided therefore, by section 20, that whenever a regiment is reduced below the minimum number allowed by law, no officer shall be appointed in such regiment beyond those necessary for the command of such reduced number; but that relates to the regimental organization, and not to the company organization. In this case there is no evidence that the regiment was reduced below the *minimum;* and as the law does not provide as to companies reduced

below the minimum, there is no legislative prohibition in this case, and no conflict between the joint resolution of 1866, even under the War Department interpretation of it, and prior laws.

We say the joint resolution provides for the payment of a certain class of officers named in it, and that the history of the resolution, as well as its language, clearly indicates that an officer, serving under a commission, should be paid as a commissioned officer, and this without regard to previous regulations prescribing conditions. The War Department barred all payment of these claims thus: The Pay Department was instructed to pay no officer except upon muster. The Adjutant General would not muster the officer, and thus the officer was remediless under the joint resolution. A glance at this resolution will show that the matter of muster was not what the legislators sought so much to do, as that pay should be given to those who served under commissions, but were not properly mustered.

The Attorney General cites no Army Regulations, and he can cite none. His defence must rest upon the 20th section of the act of 1863, which we have seen does not apply.

The act cited by the Attorney General is the obstruction, then, to payment of Henry's claim, and we see that it does not bar it.

We conclude, therefore: First, that the act of July 26, 1866, should be construed as we have interpreted it; Second, the act of July 11, 1870, does not control or abridge any right accruing under the act of 1866; and, Third, if the act of July 11, 1870, should be held to control the act of 1866, still there is nothing shown to make the payment of Henry's claim to be a violation of law or regulations.

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